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Supreme Court, U.S.
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No. 94-914

In The

Supreme Court of the United States

October Term, 1994

EDSEL ADAMS AND FRANCES T. ADAMS,

Petitioners,

v.

BARCLAYS/AMERICAN BUSINESS CREDIT, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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Barclays, p.1.c.

Barclays Bank, p.1.c.

Barclays USA, Inc.

Barclays U.S. Holdings, Inc.

Barclays American Corp.

Barclays Commercial Services Group, Inc.

Barclays Business Credit, Inc.

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ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE STANDARD OF PROOF IS NOT DISPOSITIVE OF THIS CASE.

As is often the case, the standard, burden, or quantum of proof required of Respondent to sustain its objection to the Petitioners' discharge was not an issue in the bankruptcy court. The questions before the bankruptcy court were: did the Petitioners do what Respondent alleged they did and, if so, was that conduct such as to justify denial of their discharge? As summarized by the bankruptcy court, the conduct Respondent alleged justified such a denial was: the failure to deposit receipts into a contractual dominion bank account, the post-petition transfer from the Debtor's operating account into a separate account, and the unauthorized disbursement and use of such funds. (Pet., Appendix A at 00044-45).

The issue of the standard of proof under 11 U.S.C. §727 was first raised by the Petitioners on appeal to the district court, where they implied that the bankruptcy court erroneously applied a preponderance of the evidence standard. However, a review of the June 18, 1986 Memorandum Opinion and Order (Appendix A) suggests that either Judge Leffler applied a heightened standard of proof or the result he reached would have been the same regardless of the standard applied. For example, Judge Leffler concluded with the following:

> As indicated above, in order to bar a debtor's discharge pursuant to 11 U.S.C. §727(a), it is necessary that the objecting party *conclusively show* that the debtor actually intended to hinder,

> delay or defraud his creditors. [citations omitted] Given the above facts and circumstances, the Court must conclude that *Barclays has met the burden of conclusively showing* that the Adamses actually intended to hinder or delay the collection of its debt by these pre and post-petition transfers.

Petition, Appendix A at 00052 (emphasis added).

In its findings of fact the bankruptcy court determined with regard to the Petitioners' deposit of funds into their personal rather than dominion account that, other than one letter from Mr. Adams, "there is no documentary evidence to support the Adams' explanations." (Pet., Appendix A at 00049). With regard to the Petitioners' claim that Respondent had agreed to an over-advance, the court found "no evidence to support their contention that they actually requested an over-advance or received approval for such." *Id.* at 00050. With regard to the post-petition transfers the court found "an equal lack of supporting evidence", *id.*, and that "it appears most evident that these transfers were not authorized . . . " *Id.* at 00051. In its summary of the proof the court stated that "the evidence is overwhelming that the Adamses caused to made pre and post-petition transfers of property which was subject to the validly perfected security interest of Barclays." *Id.* at 00052. Respondent submits that a finding of overwhelming evidence against the Petitioners satisfies even a clear and convincing standard of proof and, therefore, the opinions of the lower courts were correct regardless of the applicable standard of proof under §727, and it is not necessary for this Court to reach that issue.

On appeal the Petitioners contended that the bankruptcy court had erroneously applied a preponderance of the evidence standard and that they would have prevailed under a clear and convincing standard. By the time the district court ruled, this Court had issued its opinion in *Grogan v. Garner,* 498 U.S. 279, 11 S.Ct. 654, 112 L.Ed.2d 755 (1991) in which the Court held that the standard of proof in dischargeability actions under 11 U.S.C. §523(a) was a preponderance of the evidence. The district court noted that *Grogan* concerned the standard under §523(a), but agreed with the majority of courts which have considered the question that the rationale of this Court applied equally to objections under §727. (Pet., Appendix D at 00073-74). It was not necessary and the district court did not decide what standard the bankruptcy court actually applied since by virtue of its having granted judgment in favor of Respondent, the bankruptcy court must have found that the proof at least satisfied the lower of the two standards, the preponderance of the evidence, which the district court concluded was the proper one. The Sixth Circuit also assumed that the bankruptcy court applied that standard based upon its analysis of the cases cited by the bankruptcy court. (Pet., Appendix F at 00098-99 n.1).

Respondent respectfully submits that a fair reading of the bankruptcy court's opinion, including its evaluation of the proof on each of the points of conduct alleged by Respondent, its multiple use of the term "conclusive", and its finding of "overwhelming" evidence against Petitioners, reveals that the bankruptcy court applied a clear and convincing standard, or one at least as rigorous.

II. INTERVENTION BY THIS COURT IS UNNECESSARY AND UNWARRANTED WITH REGARD TO THE STATED QUESTION.

The Petition presents no compelling reason why this Court should exercise its certiorari jurisdiction or expend its valuable resources ruling on a question to which there is a virtually unanimous answer. There is no conflict among the circuits and no strong difference of opinion in the lower courts either. The fact of the matter is that since this Court's decision in *Grogan*, virtually every court that has considered the appropriate standard of proof in denial of discharge actions has resolved that issue in favor of the preponderance standard. As the following representative listing demonstrates, courts in every judicial circuit except the Seventh, in which there are no reported cases since *Grogan*, have concluded that the preponderance standard applies:

First Circuit – *In re Cunningham*, 163 B.R. 657, 659 (Bankr. D. Mass. 1994); Second Circuit – *In re Shah*, 169 B.R. 17, 20 (Bankr. E.D. N.Y. 1994); *In re Maletta*, 159 B.R. 108, 111 (Bankr. D. Conn. 1993); *In re Wolfson*, 139 B.R. 279, 280 (Bankr. S.D. N.Y. 1992); Third Circuit – *In re Cook*, 146 B.R. 934, 940 (Bankr. E.D. Penn. 1992); *In re Kisberg*, 150 B.R. 354, 356 (Bankr. M.D. Penn. 1992); Fourth Circuit – *Farouki v. Emirates Bank International*, 14 F.3d 244, 250 (4th Cir. 1994); Fifth Circuit – *In re Beaubouef*, 966 F.2d 174, 178 (5th Cir. 1992); Sixth Circuit – *In re Adams*, 31 F.3d 389, 394 (6th Cir. 1994); Eighth Circuit – *In re Baughner*, ___ B.R. ___, 1994 W.L. 578458 (Bankr. S.D. Iowa 1994); *In re Kingsley*, 162 B.R. 249, 254 (Bankr. W.D. Mo. 1994); Ninth Circuit – *In re Lawler*, 154 B.R. 425, 429 (9th Cir. B.A.P. 1992); *In re Towe*, 147 B.R. 545, 547 (Bankr. D. Mont. 1992);

Tenth Circuit – *In re Serafini*, 938 F.2d 1156, 1157 (10th Cir. 1991); Eleventh Circuit – *In re Levine*, 166 B.R. 967, 970 (Bankr. M.D. Fla. 1994).

As can be seen from the foregoing, the preponderance standard is now the law of the land and no further utterance from this Court is necessary to make it so. Only if all of these courts are wrong and this Court did not intend the *Grogan* preponderance standard to apply in §727 actions should this Court grant the Petition.

The Petitioners argue that since denial of discharge under §727 applies to all debts, while a determination of non-dischargeability under §523 applies only to the particular debt in question, the presumption in favor of discharge requires a heightened standard of proof under §727. Of course in some cases where the debtor may have engaged in conduct leading to numerous determinations of non-dischargeability, the difference in effect upon the debtor between §523 and §727 is diminished. Indeed, §727 in some cases merely operates as an efficient and economical vehicle by which numerous creditors can obtain the same relief they could individually under §523.

But even where a denial of discharge may have much greater consequences than dischargeability determinations, it is only the economic, not personal liberty, interests of the debtor that are at stake. "Issues relating solely to economic interests are only subjected the preponderance of the evidence standard." Barbarosh, *Application of Heightened Standard of Proof Not Very Clear and Convincing Under 11 U.S.C. §727(a)*, 22 Pac. L.J. 1205 (1991) (concluding that the appropriate standard of proof under §727(a) is a preponderance of the evidence). The Tenth

Circuit in *In re Serafini*, 938 F.2d 1157 (10th Cir. 1991) held that "it would be incongruous to apply a 'preponderance of the evidence' standard to §523(a) and a 'clear and convincing' standard to §727(a)(2). Such would be clearly at odds with the rationale in *Grogan*." *Id.* at 1157. According to the Tenth Circuit, the *Grogan* rationale is that the preponderance of the evidence standard applies in all civil actions between private litigants unless particularly important individual interests or rights are at stake, and that debtors do not have an interest in discharge sufficient to require a heightened standard of proof. *Id.* at n.2, *citing Grogan*, ___ U.S. at ___, 111 S.Ct. at 658-59. *Accord*, *In re Henderson*, 134 B.R. 147, 156 (Bankr. E.D. Penn. 1991); *In re Wolfson*, 139 B.R. 279, 284 (Bankr. S.D. N.Y. 1992); *In re Harmon*, 1992 W.L. 13624 (Bankr. W.D. Tenn. 1992). In applying the *Grogan* rationale to §727 actions some courts have expressly rejected the argument made by the Petitioners that denial of discharge under §727 and, thus, no "fresh start" demands a heightened standard of proof. In *In re Cook*, 126 B.R. 261 (Bankr. E.D. Tex. 1991), the bankruptcy court noted that the interest of protecting the victims of fraud out-weighed the interest of giving perpetrators of fraud a fresh start, *Grogan* at 111 S.Ct. 659, and held that such balance of interests was equally applicable to §727 actions. The court was of the opinion that a lower standard of proof may even be more appropriate under §727 since the majority of such proceedings deal with upholding the integrity of the bankruptcy process rather than serving as a protective device for wronged creditors. 126 B.R. at 266. *Accord*, *In re Sumpter*, 136 B.R. 690, 694-95 (Bankr. E.D. Mich. 1991). In *Sumpter*, the court

observed that the right to discharge of all debts is qualitatively indistinguishable from the right to discharge particular debts since all that is involved is money:

> [A]nd there is accordingly no principled basis for requiring an elevated standard of proof where denial of a general discharge is sought. *See, In re Watkins*, 90 B.R. 848, 856, 18 B.C.D. 311, 19 C.B.C. 2d 678 (Bankr. E.D. Mich. 1988) (suggesting that the preponderance standard should generally govern where the defendant's "economic rights," rather than his "liberty rights" are at stake); *See, also In re Bidlofsky*, 57 B.R. 883, 893 (Bankr. E.D. Mich. 1985) (implicitly assuming that the distinction between denying a discharge and granting an exception to discharge is irrelevant for purposes of determining the appropriate evidentiary standard).

In re Sumpter, 136 B.R. 690, 694 (Bankr. E.D. Mich. 1991).

Respondent submits that the distinction between §727 and §523 is only one of degree and that the result is essentially the same under either section: the debtor will owe pre-petition debts at the conclusion of the case. Therefore, there is no requirement of a higher standard of proof under §727 than under §523.

CONCLUSION

Considering the plethora of petitions that are being or will be filed seeking Supreme Court determination of the within issue, the Court will have better opportunities to do so than this one. This is not a close case that turns on which standard applies. If the lower courts' decisions

are affirmed because the proof satisfied either standard, any comment the Court includes on the proper standard is in danger of being perceived as dictum, leaving the door open for continued petitions. Although there is no reason to believe that the Federal judiciary is in need of any guidance on this point, if the Court thinks otherwise, more appropriate cases will surely present themselves. Respondent respectfully requests that the Petition for writ of certiorari be denied.

Respectfully submitted,

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